

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO  
3  
4

EDWIN ORTIZ-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 13-1154 (JAF)

(Crim. No. 95-cr-29-36)

5  
6 **OPINION AND ORDER**

7 Petitioner Edwin Ortiz-Figueroa (“Ortiz”) comes before the court with a petition  
8 under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence we imposed. (Docket  
9 No. 1.) The United States opposes his motion. (Docket No. 3.) This is the second time  
10 Ortiz has petitioned us for relief under Section 2255. (Crim. No. 95-cr-29, Docket  
11 No. 2893.) Because Ortiz failed to obtain certification from the First Circuit to file a  
12 successive petition, we lack jurisdiction and must dismiss the motion.

13 **I.**

14 **Background**

15 Ortiz, along with codefendants, was tried before a jury beginning on  
16 November 17, 1997. (Crim. No. 95-cr-29, Docket No. 1917.) He was charged with  
17 conspiracy to possess with intent to distribute cocaine base, cocaine, and heroin in  
18 violation of 21 U.S.C. §§ 841, 846; using and carrying a firearm during and in relation to  
19 a drug conspiracy in violation of 18 U.S.C. § 924(c); conspiracy to kill while engaged in  
20 a drug conspiracy in violation of 21 U.S.C. §§ 846, 848(e)(1)(A); and intentionally  
21 killing or attempting to kill while engaged in a drug conspiracy in violation of 18 U.S.C.

1 § 2 and 21 U.S.C. §§ 846, 848(e)(1)(A). He was also charged with liability for  
2 conspiracy under Pinkerton v. United States, 328 U.S. 640 (1946). U.S. v. Collazo-  
3 Aponte, 216 F.3d 163, 174 (2000). On February 16, 1998, the jury returned guilty  
4 verdicts as to all defendants on all counts. We sentenced Ortiz to concurrent terms of life  
5 imprisonment on multiple counts and to a consecutive ten-year term on Count 65, the  
6 firearms charge. Id.

7 On July 2, 1998, Ortiz filed a notice of appeal. (Crim. No. 95-cr-29, Docket  
8 No. 2340.) On June 27, 2000, the First Circuit affirmed Ortiz's conviction and sentence.  
9 Collazo-Aponte, 216 F.3d at 207. On July 12, 2001, Ortiz motioned the court to vacate  
10 his sentence under 28 U.S.C. § 2255. (Crim. No. 95-cr-29, Docket No. 2893.) On  
11 November 25, 2003, we summarily dismissed his petition. (Crim. No. 95-cr-29, Docket  
12 No. 3275.) On February 28, 2008, Ortiz moved the court for retroactive application of  
13 the sentencing guidelines to his crack cocaine offense under 18 U.S.C. § 3582. (Crim.  
14 No. 95-cr-29, Docket No. 3197.) On October 28, 2008, we denied Ortiz's motion for  
15 retroactive application of the sentencing guidelines. (Crim. No. 95-cr-29, Docket  
16 No. 3347.) On January 12, 2009, Ortiz filed a notice of appeal. (Crim. No. 95-cr-29,  
17 Docket No. 3400.) On June 30, 2009, the First Circuit summarily affirmed our ruling,  
18 stating that "the denial of a reduction was not error." (Crim. No. 95-cr-29, Docket  
19 No. 3401.) The First Circuit stated that Ortiz's sentence "was based on the cross-  
20 reference to murder under the guidelines [and therefore] the United States Sentencing  
21 Commission cocaine base amendments do not render him eligible for a reduction of  
22 sentence." (Id.)

23 On January 31, 2013, Ortiz filed the instant petition as a Rule 35 motion. (Crim.  
24 No. 95-cr-29, Docket No. 3597.) We ordered that it should be treated as a petition under

1 28 U.S.C. § 2255. (Crim. No. 95-cr-29, Docket No. 3601.) On February 22, 2013, Ortiz  
2 re-filed his motion as one to vacate, set aside or correct his sentence under 28 U.S.C.  
3 § 2255. (Docket No. 1.) On April 12, 2013, the United States filed a response in  
4 opposition to Ortiz’s motion. (Docket No. 3.) On May 9, 2013, Ortiz filed a  
5 supplemental motion to amend his motion to vacate, set aside, or correct the sentence.  
6 (Docket No. 4.)

## 7 II.

### 8 Legal Standard

9 Before filing a second or successive motion under Section 2255, a defendant  
10 “shall move the appropriate court of appeals for an order authorizing the district court to  
11 consider the application.” 28 U.S.C. § 2244(b)(3)(A); see also, 28 U.S.C. § 2255 (“A  
12 second or successive motion must be certified as provided in section 2244 by a panel of  
13 the appropriate court of appeals....”). A district court lacks jurisdiction over a second or  
14 successive petition unless the defendant obtains certification from the appropriate court  
15 of appeals. Trenkler v. United States, 536 F.3d 85, 96 (1<sup>st</sup> Cir. 2008). Ortiz submitted  
16 his first motion under Section 2255 on July 12, 2001, and we dismissed that motion on  
17 November 25, 2003. (Crim. No. 95-cr-29, Docket Nos. 2893, 3275.) Ortiz has not  
18 obtained certification from the First Circuit to file a successive petition and, therefore, we  
19 lack jurisdiction to rule on this motion.

## 20 III.

### 21 Certificate of Appealability

22  
23 In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever  
24 issuing a denial of § 2255 relief we must concurrently determine whether to issue a  
25 certificate of appealability (“COA”). We grant a COA only upon “a substantial showing

1 of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make this showing,  
2 “[t]he petitioner must demonstrate that reasonable jurists would find the district court's  
3 assessment of the constitutional claims debatable or wrong.” Miller-El v. Cockrell, 537  
4 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). While  
5 Ortiz has not yet requested a COA, we see no way in which a reasonable jurist could find  
6 our assessment of his constitutional claims debatable or wrong. Ortiz may request a  
7 COA directly from the First Circuit, pursuant to Rule of Appellate Procedure 22.

8 **V.**

9 **Conclusion**

10 For the foregoing reasons, we hereby **DENY** Ortiz’s § 2255 motion (Docket  
11 No. 1). Pursuant to Rule 9 of the Rules Governing § 2255 Proceedings, summary  
12 dismissal is in order because Ortiz must obtain an order from the court of appeals before  
13 we can consider a second petition under § 2255.

14 **IT IS SO ORDERED.**

15 San Juan, Puerto Rico, this 8th day of January, 2014.

16 S/José Antonio Fusté  
17 JOSE ANTONIO FUSTE  
18 U. S. DISTRICT JUDGE